

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS

No. 99-583V

Filed: July 26, 2007

Not for Publication

DONNOVAN LAMAR, by his mother and *
natural guardian, TYEKA LAMAR, *
 *
 *
Petitioner, *
 *
 *
v. *
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 *
SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *
 *
 *
Respondent. *
 *

Judgment on the record,
Hepatitis B Vaccine,
Seizure Disorder

Clifford Shoemaker, Esq., Shoemaker and Associates, Vienna, VA, for petitioner.
Vincent Matanoski, Esq., U.S. Department of Justice, Washington, DC, for respondent.

DECISION¹

Denise K. Vowell, Special Master:

On August 4, 1999, Tyeka Lamar filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*² [the “Vaccine Act” or “Program”] on behalf of her son, Donovan Lamar [“Donnovan”],

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

² Hereinafter, for ease of citation, all “§” references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2000 ed.).

alleging that hepatitis B vaccines and “other vaccinations” he received caused him to develop unspecified “adverse reactions.” Petition, ¶ 3. The petition did not identify the other vaccines nor specify when the vaccines were received. None of the statutorily required supporting documentation accompanied the petition.³ Accordingly, the special master to whom the case was then assigned ordered petitioner to file the required documentation or a written status report informing the court of progress in obtaining that information by December 6, 1999. Order, dated September 1, 1999. No status report or any other documentation was filed in response to this order.

Petitioner’s counsel filed a motion to designate a master file in numerous cases alleging injury from the hepatitis B vaccine on December 9, 1999, including Donovan’s case. That motion was denied on February 14, 2000. Thereafter, petitioner filed a status report on February 15, 2000. On April 27, 2000, his case was stayed for 180 days. Nonetheless, petitioner filed status reports on May 16, August 21, and December 12, 2000 and on March 13, 2001, indicating that records were still being collected for filing.

On July 31, 2001 petitioner sought authority to subpoena medical records; the motion was granted on August 14, 2001. Although no medical records had yet been filed, petitioner was ordered to file the report of a medical expert by August 29, 2002, or request a stay by July 30, 2002. Order, dated July 9, 2002. On July 19, 2002, petitioner requested a stay of the proceedings.

The stay of proceedings was the last substantive action on this case until a joint recorded status conference on March 27, 2006, for this and numerous other hepatitis B vaccine cases. At that status conference, petitioner’s counsel indicated that he was unable to locate his client. Petitioner’s counsel was ordered to file a status report by May 26, 2006, detailing his progress in contacting his client.

Petitioner’s counsel missed the May 26, 2006 deadline, and on May 27, 2006, he requested an additional 30 days to locate his client. I held another joint recorded status conference on July 9, 2006, during which I informed counsel that motions for extensions of time must be timely filed, detail specifically what efforts counsel have made to comply with an order, and estimate when compliance may be expected. Order, dated June 26, 2006. Based on petitioner’s counsel’s representations at that status conference, I ordered him to file a status report by July 26, 2006, detailing his progress in locating his client, and indicated that I would entertain motions to rule on the record as it stands, in the event counsel could not locate his client. *Id.*

On June 1, 2006, petitioner’s counsel filed Petitioner’s Exhibits [“Pet. Ex.”] 1-2, the first medical records filed in this case. Petitioner’s Exhibit 1 established that Donovan was born on January 7, 1997, and received hepatitis B vaccinations on

³ Section 300aa–11(c) of the Vaccine Act requires the petition to be accompanied by certain documentary evidence, including records pertaining to the vaccination and subsequent treatment. See also, Vaccine Rule 2(e), RCFC, Appendix B.

January 1, May 25, and October 31, 1997, and diphtheria, pertussis, tetanus, polio and Haemophilus influenzae type b vaccinations on May 28, 1997, and July 25, 1997. *Id.*, pp. 1-2. Petitioner's Exhibit 2 indicated that Donovan began having seizures when he was three months old, and at 15 months of age was diagnosed with progressive encephalopathy. *Id.*, p. 2.

In the July 26, 2006 status report, petitioner's counsel indicated that he had located his client and requested 60 days to obtain and file Donovan's medical records. I ordered the medical records and petitioner's affidavit to be filed by September 25, 2006, and an expert medical report to be filed by November 22, 2006. On September 25, 2006, petitioner requested a 60 day extension of time to file the affidavit and the medical records and indicated that she was not able to complete all the paperwork. I granted the motion in part, giving petitioner an additional thirty days to file the medical records and affidavit, but also noting that, in spite of numerous status reports dating from 2000 indicating that records were being collected, only minimal records had been filed. I indicated that petitioner was risking having her case dismissed for failure to substantiate her claim if she failed to comply with the order to produce the medical records and her affidavit. Order, dated September 29, 2006.

Petitioner failed to comply with the order to produce records and an affidavit by October 27, 2006, instead filing a status report detailing Donovan's condition and the difficulties encountered by his mother on a daily basis. I held a status conference on November 21, 2006, and, based on representations by petitioner's counsel that she could file the medical records and petitioner's affidavit by January 22, 2007, granted petitioner an extension to file them by that date. I also ordered petitioner to disclose the name of the medical expert reviewing Donovan's case by February 19, 2007. Order, dated November 22, 2006.

Numerous medical records were filed by January 22, 2007, and I granted yet another extension to file the remaining records by February 22, 2007. Petitioner filed a late status report naming her expert on February 20, 2007, and another request for an extension of time to obtain medical records and file petitioner's affidavit on February 22, 2007. In an order issued on March 8, 2007, nearly a year after activity on this case had resumed, I summarized the many delays granted in this case and granted one final extension of time to file petitioner's affidavit and the outstanding medical records. I warned petitioner that further delays risked the dismissal of this case for failure to comply with court orders. After a status conference on March 19, 2007, I ordered the affidavit or narrative to be filed by the previously imposed deadline of March 30, 2007, and the expert report filed by May 30, 2007. Order, dated March 20, 2007. The affidavit was filed on time.

Petitioner requested and received an extension of time until June 29, 2007, to file the expert report. On that date, petitioner indicated that she would be filing a motion for judgment on the record. As no expert report was filed, the motion for judgment on the record was filed on July 20, 2007, and indicated that petitioner could not find an expert to support causation. In a July 24, 2007 response to the motion for judgment on

the record, respondent interposed no objection.

Having considered the entire record, I conclude that petitioner failed to demonstrate Donovan's entitlement to compensation.

DISCUSSION

In order to prevail under the Program, petitioner must prove either a "Table"⁴ Injury or that a vaccine listed on the Table was the cause in fact of an injury. Petitioner did not suffer a "Table" Injury. While Pet. Ex. 1 establishes that Donovan received several vaccines covered by the Vaccine Act, the submitted evidence does not link petitioner's vaccinations to any illness, disability, injury, or condition. See § 300aa-11(c)(1)(C)(i).

The Vaccine Act provides that a special master may not make a finding awarding compensation based on the claims of a petitioner alone, unsubstantiated by medical records or medical opinion. See § 300aa-13(a)(1). Petitioner has failed to proffer medical records or an expert medical opinion causally linking Donovan's medical condition to any vaccine.

To satisfy his burden of proving causation in fact, petitioner must demonstrate by preponderant evidence that Donovan's vaccinations caused his injury, "by providing: (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury." *Althen v. Sec'y, HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005). See also, *Hines v. Sec'y, HHS*, 940 F.2d 1518, 1525 (Fed. Cir. 1991). Petitioner must show "that the vaccination was the reason for the injury. A reputable medical or scientific explanation must support this logical sequence of cause and effect." *Grant*, 956 F.2d 1144, 1148 (Fed. Cir. 1992). Circumstantial evidence and medical opinions may be sufficient to satisfy the second *Althen* factor. *Capizzano v. Sec'y, HHS*, 440 F.3d 1317, 1325 (Fed. Cir. 2006). Without more, "evidence showing an absence of other causes does not meet petitioner's affirmative duty to show actual or legal causation." *Grant*, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. See *Hasler v. U.S.*, 718 F.2d 202, 205 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984).

The medical records in this case establish that Donovan was diagnosed with a seizure disorder by April 22, 1997. Pet. Ex. 4, pp. 820-21. This exhibit indicates that the onset of the seizures was probably a month earlier. *Id.*, pp. 821-22, 825-26. At that point, Donovan had only received one vaccination – the hepatitis B vaccine he received at birth. When Donovan was three years of age, Dr. James Carroll of the Medical College of Georgia's Child Neurology Clinic noted that, given Donovan's

⁴ A "Table" Injury is an injury listed on the Vaccine Injury Table, 42 C.F.R. § 100.3, corresponding to the vaccine received within the time frame specified.

family history, his condition was an X-linked recessive disorder.⁵ *Id.*, p. 74.

No medical opinion relates Donovan's condition to his hepatitis B vaccination, although several medical histories recite an onset after vaccination. See, Pet. Ex. 7, p. 94 (reporting seizures began after first diphtheria, pertussis, and tetanus vaccination); Pet. Ex. 4, p. 317 (reporting that developmental delay began after immunizations); *Id.*, p. 647 (reporting seizure disorder's onset immediately after vaccination). None of Donovan's doctors appear to have adopted the family's view of causation; the records repeatedly reference a genetic basis for Donovan's condition. See, e.g., Pet. Ex. 4, pp. 40, 74, 144, 222-24.

Despite ample opportunities to do so, petitioner has failed to find a medical expert to opine favorably on causation. While close calls regarding causation must be resolved in favor of the petitioner, *Althen*, 418 F.3d at 1280, in this case petitioner has completely failed to establish vaccine causation of Donovan's condition.

CONCLUSION

A special master can only authorize compensation when a medical condition either constitutes a "Table" injury or when some evidence, such as a reliable medical opinion, causally connects the vaccine with the injury. No such proof exists in the record before me. Therefore, the petition for compensation is DENIED. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance with this decision.⁶

IT IS SO ORDERED.

s/ Denise K. Vowell
Denise K. Vowell
Special Master

⁵ The record referenced Donovan's older brother's similar seizure disorder and that of a male cousin (his mother's sister's son).

⁶ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.